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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92050966
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

In re: Registration No. 3,074,073

Mark:



Atlas Flowers, Inc., d/b/a Golden
Flowers,

Petitioner,

v.

Cancellation No. 92050966

Golden Vision Flower, Inc.

Registrant.

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REGISTRANT'S TRIAL BRIEF

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STATEMENT OF THE FACTS

Registrant, Golden Vision Flower, Inc. ("Golden Vision"), is a Florida corporation established in 2003, and the owner of the "Golden Vision Flower, Inc. and Design" trademark registered on the Principal Register under Registration number 3,074,073 (the '073 Registration). It has been using the Golden Vision and Design trademark since 2004. (Chuang Tr. 42-43). The deposition testimony of Li Ying Chuang will be referred to as "Chuang Tr."; the testimony of Shun Chi Huang will be referred to as "S.C. Huang Tr." and the testimony of Shih Wen Huang will be referred to as "S.W. Huang Tr." Golden Vision is a family business owned by Shun Chi Huang and Li Ying Chuang. (S.W. Huang 9:1-4). Mr. Huang and Mrs. Chuang live in Taiwan and neither speaks nor reads English. (S.W. Huang Tr. 10:4-7, 12:4). Their daughter, Shih Wen Huang, works for Skypro Trading, Inc. which handles sales and marketing for Golden Vision. Ms. Huang has only worked in this capacity since 2007, and not from the inception of Golden Vision. (S.W. Huang Tr. 11:12-15).

Golden Vision has used its mark on commercial pamphlets, ads in magazines, care tags on its plants, and on its shipping cartons. (S.C. Huang Tr. 32:1 – 35:24, 40:22 -25, 58:19-22, and 61:4 – 62:5). Golden Vision sells its products to wholesale growers. (S.W. Huang 31:5-7). Today its sales mostly encompass orchids. (S.W. Huang 13:1-4). The '073 Registration issued on March 28, 2006. ('073 Application file). As noted in Petitioner's Trial Brief, "Flower, Inc." was disclaimed.

Atlas seeks registration under pending applications numbered 77/571417 and 77/571430. (Bayona Trial Tr. 57:7-58:5). Those applications have disclaimed the word

"Flowers". (Atlas application files). Prior to that time Atlas used a "Golden Flowers and Design" mark registered on the Principal Register on October 29, 2002 under number 2,642,650 (the "650 Registration"). Atlas believes that the mark contained in application 77/571417 is merely an update and modernization of the '650 Registration. (Bayona Trial Tr. 106:24-25 to 107:1-2). The '650 Registration was cancelled on June 6, 2009. The transcript of the discovery deposition of Alejandro Bayona is Document 1 to Golden Vision's Notice of Reliance, Dkt. No. 25, and will be referred to as "Bayona Disc. Tr." The transcript of the trial deposition of Mr. Bayona filed by Atlas will be referred to as "Bayona Trial Tr."

Atlas's '650 Registration was not cited as a bar to Golden Vision's '073 Registration under Section 2(d) while the '650 Registration was still alive. ('073 Application file). The parties have used their marks simultaneously since at least 2004 and there has been no confusion between them in the marketplace. (Bayona Disc. Tr. 43:10-13; Bayona Test. Tr. 119:7-9 and 120:6-7; Atlas's Answers to Interrogatories #23, Document 3 to Golden Vision's Notice of Reliance; and Atlas's Response to Request for Admissions #8, Document 4 to Golden Vision's Notice of Reliance). Atlas was not aware of the existence of Golden Vision until the '073 Registration was cited by the examining attorney as a bar to registration of the 77/571417 and 77/571430 applications. (Bayona Disc. Tr. 27:17-19).

SUMMARY OF ARGUMENT

1. U.S. Registration No. 3,074,073 should not be cancelled because it is not likely to cause confusion, mistake or to deceive as it relates to Atlas's use of its Golden Flowers mark. Contrary to the assertions of Atlas, the marks are not used for similar

goods, are not similar in appearance, sound or connotation, and are distributed through different channels of trade. In fact, the parties have used their respective marks simultaneously for nearly eight years without one instance of confusion.

2. U.S. Registration No. 3,074,073 should not be cancelled as to all goods other than live orchids because Golden Vision has marketed the goods listed in its Registration even if the economic realities have not resulted in sales of all goods.

3. U.S. Registration No. 3,074,073 should not be cancelled based on the incorrect designation of Mrs. Chuang as President of Golden Vision on the Statement of Use. Atlas has failed to demonstrate by clear and convincing evidence that such designation was made with the requisite intent to defraud the Trademark Office and that Mrs. Chuang lacked personal knowledge sufficient to verify the facts in the Statement of Use. Atlas has not shown that Mrs. Chuang was not authorized by her husband, Golden Vision's President, to sign the Statement of Use. At most, Atlas has shown an innocent mistake with the incorrect designation that could have been raised and addressed by the examining attorney.

4. U.S. Registration No. 3,074,073 should not be cancelled because Atlas has failed to demonstrate by clear and convincing evidence that the goods listed on the Statement of Use were not being marketed and sold by Golden Vision at the time of its execution and that Golden Vision had the requisite intent to defraud the Trademark Office. Atlas relies solely on inferences and the hope that this Board will adopt a reckless disregard standard in determining intent to deceive. Even under a reckless disregard standard Atlas has failed to produce competent, clear and convincing evidence that would satisfy its requirements of proof.

ARGUMENT

I. There Is No Likelihood of Confusion

Among the factors used to determine likelihood of confusion is the similarity or dissimilarity of the marks in their entireties as to appearance, sound, connotation, and commercial impression. *In Re E.I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563, 567 (CCPA 1973).

Although the marks in this proceeding each share the word “Golden,” that is where the similarity ends. The two marks are dissimilar due to Golden Vision’s use of the word “FLOWER” in the singular tense, plus the words VISION INC., along with its unique curved design with 2 leaves adjacent to the word “GOLDEN” and above “VISION FLOWER INC.”



to create the unique design of . Atlas’s Mark combines GOLDEN with the plural word FLOWERS and a circular design predominantly on top of the words with a



drawing of a flower inside the circle, namely . Both parties were required by the USPTO to disclaim the words FLOWER and FLOWERS apart from the marks due to descriptiveness. In addition, Golden Vision always uses the word VISION with the word GOLDEN, and usually in the stylized manner as registered. The two marks create a completely different commercial impression. Atlas correctly states that more weight should be given to the dominant portions of the marks in evaluating the likelihood of confusion. It is further correct in stating that portions of the marks that are disclaimed and descriptive or

generic are considered weak and do little to distinguish one mark from another. However, Atlas is quite incorrect in arguing that the marks are similar especially when FLOWER and FLOWERS are disregarded. When those terms are disregarded one is left with the marks as GOLDEN VISION with a predominant design and GOLDEN with a completely different design.

Similarity is not a binary factor but is a matter of degree. See, *In re Coors Brewing Co.*, 343 F.3d 1340 (Fed. Cir. 2003) (holding that use of exact mark BLUE MOON but with different designs for beer and restaurant services not sufficiently related to preclude registration of both marks). Likewise, Golden Vision uses its unique




design mark to sell flowers, primarily orchids. The parties' products are not sufficiently related when the marks are so completely different in appearance, connotation and commercial impression. These differences should outweigh the similarities in the likelihood of confusion analysis especially given the weakness of the common elements, namely, FLOWER(S), due to its descriptiveness, and GOLDEN, due to its widespread use discussed below. See, *In re Box Solutions Corp.*, 79 USPQ 2d 1953 (TTAB 2006)(holding applicant's stylized BOX SOLUTIONS mark for computer communications services not likely to cause confusion with registrant's BOX mark and design for computers and computer peripherals); See also, *Bass Pro Trademarks, LLC v. Sportsman's Warehouse, Inc.*, 2008 WL 927726, 89 USPQ 2d 1844 (TTAB 2008) (holding no likelihood of confusion between the distinctive BASS PRO SHOPS SPORTSMAN'S WAREHOUSE logo and SPORTSMAN'S WAREHOUSE marks, due to descriptiveness of

common words, SPORTSMAN'S WAREHOUSE).


As further evidence of the lack of overall similarity, when Golden Vision applied for

its  trademark in 2004 Atlas's '650 Registration for GOLDEN

FLOWERS and design, namely  Golden Flowers, was in full force and effect. Yet, the U.S. Patent and Trademark Office did not see a similarity between the marks, did not issue a refusal based on a likelihood of confusion, and passed the Golden Vision mark promptly on to publication for third-party objection, and none was filed.

The two marks,  and  are different in sound, appearance, connotation and commercial impression, and this important factor weighs in favor of Golden Vision.

Two other factors regarding the issue of likelihood of confusion are 1) the similarity or dissimilarity and nature of the goods or services as described in an application or registration or in connection with which a prior mark is in use, [emphasis added] and 2) the similarity or dissimilarity of established, likely-to-continue trade channels. *duPont*, 177 USPQ at 567. Atlas's use of its GOLDEN FLOWERS and design mark for "fresh cut

flowers" may appear similar to Golden Vision's use of  for the goods described in its registration, but Golden Vision primarily uses its mark for orchids. (S.W.

Huang Tr. 20:1-4). By its own description, Atlas uses the GOLDEN FLOWERS Mark for fresh cut flowers – and never uses the mark for orchids. (Bayona Disc. Tr.: 61, 62). Since Golden Vision's products are specifically orchids, the likelihood of confusion is greatly lessened.



With regard to trade channels, Golden Vision's products have been and always will be marketed and sold to wholesale sellers of orchids. Atlas does not sell orchids, has not sold them since Mr. Bayona has been with the company, has no plans to sell them in the near future, and has no relationships with orchid suppliers. (Bayona Disc. Tr.:16:7-20 and 61:12-25-62:1-2). Golden Vision has been selling orchids since 2004 and its representative has never seen use of the Atlas mark anywhere for selling anything. (S.W. Huang Tr. 33:25-34:1-2). Atlas sells flowers that one would find in a flower shop to wholesalers, supermarkets and e-commerce merchants. (Bayona Disc. Tr. 23:1-16 and 39:10-13). Those buyers are sophisticated commercial buyers purchasing flowers for later sale to the consuming public. In doing so, Atlas has never crossed paths with Golden Vision or its goods. (Bayona Disc. Tr. 28:11-23). Thus, the trade channels for the sale of the goods covered by the Atlas Mark are completely different from Golden Vision's trade channels for the sale of its orchids.

The following testimony of Mr. Bayona is particularly illustrative of the separate channels of trade, lack of confusion, and likelihood that the parties' marks will not be confused in the future:

- Atlas could only identify seven customers out of its 375-400 customers who

carry orchids in addition to Atlas's flowers. (Bayona Trial Tr. 43:14-21 and 105:1-9).

- Atlas had never heard of Golden Vision prior to the examining attorney citing the '073 Registration as a bar to Atlas's applications. (Bayona Disc. Tr. 17-19).
- Atlas and Golden Vision have never crossed paths in conducting their respective sales and marketing. (Bayona Disc. Tr. 28:11-23).
- Prior to the office action directed to Atlas's application for registration, Atlas had not seen Golden Vision at any of the trade shows it had attended. (Bayona Disc. Tr. 39:14-20 and 42:21-23).
- Prior to the office action directed to Atlas's application for registration, it had not seen any advertisements for Golden Vision. (Bayona Disc. Tr. 43:3-9).
- No Atlas customers have confused Atlas's Mark with Golden Vision's Mark. (Bayona Disc. Tr. 43:10-18).
- If the examining attorney had not cited Golden Vision's Mark as a bar to registration of the Atlas Mark there is a good chance that Atlas would not be aware of Golden Vision to this day. (Bayona Disc. Tr. 43:19-23).
- Atlas is not aware of a single customer that it has in common with Golden Vision. (Bayona Trial Tr. 125:16-19).
- Atlas's customers know that it does not sell orchids and none have tried to order any from Atlas. (Bayona Trial Tr. 120-122)

- Atlas's market share and annual revenue have continued to grow and neither has been affected by Golden Vision's use of its own mark. (Bayona Trial Tr. 126:3-9).

The analysis of the trade channel factor should include the consideration of whether and to what extent the products compete with each other, including price, style, intended use, and target clientele, along with the typical distribution channels. *Paco Sport, Ltd. v. Paco Rabanne Parfums*, 54 USPQ 2d 1205 (S.D. N.Y. 2000), *aff'd*, 234 F.3d 1262 (2nd Cir. 2000) (holding no likelihood of confusion between PACO RABANNE clothing and fragrance and PACO SPORT for casual clothing since defendant marketed its clothing to young, urban males, whereas plaintiff's marketed to high-fashion conscious consumers. Defendant used inexpensive, retail outlets in urban neighborhoods whereas plaintiff sold through exclusive, upscale department and specialty stores. Defendant's products were significantly cheaper than plaintiff's, and the parties' products differed significantly in style and image). Likewise, the goods of Atlas and Golden Vision do not compete. Golden Vision's pricing, intended use and target clientele are all specifically related to orchids and wholesalers of orchids. Atlas's flowers are likely targeted to a much broader audience, but not specifically targeted to specialty shops or wholesalers carrying orchids. In fact, Atlas could identify only seven customers out of its 375 to 400 customers who carry orchids. (Bayona Trial Tr. 43:14-21 and 105:1-9). Additionally, it is not likely that the ultimate consumer even sees the Atlas mark because the flower sleeve is not necessarily on the flowers when they reach the consumer. (Bayona Disc. Tr. 24:21-25 and 25:1-21). The boxes bearing the Atlas Mark never reach the public consumers. *Id.* Thus, no market

interface exists between Golden Vision and Atlas and this factor weighs in favor of Golden Vision.

The mere fact that both marks are used for something related to flowers and/or plants is not determinative. In *Viacom International, Inc. v. Komm*, 46 USPQ 2d 1233 (TTAB 1998), the court held that the mere fact that computer accessories and computer toys/games both involve computers or software did not demonstrate that the computer software on which the applicant used its mark was within the natural scope of expansion of the use of the opposer's mark. Thus, the court found no likelihood of confusion between a MY-T-MOUSE specialized software program and the opposer's MIGHTY MOUSE interactive computer games. Among the factors considered were the relatively sophisticated purpose of the computer programs, the fact that it would not likely be casually purchased, and, to the extent children would be using the product, they would not likely be the purchasers. *Id.* at 1238. Similarly, Golden Vision's products are for a sophisticated specific purpose. The wholesalers purchasing and re-selling the orchids are sophisticated commercial customers and not casual purchasers. Atlas's customers are also sophisticated commercial wholesalers, supermarkets and e-commerce merchants. Clearly, the parties' products are not likely to be casually purchased by unsuspecting and unsophisticated consumers.

With regard to whether or not the products compete with each other, the Atlas Mark is not used on any products sold off the shelf next to Golden Vision's products using



, nor on any goods or services related to orchids. (Bayona Disc.

Tr.:16:7-20 and 61:12-25-62:1-2). In fact, the Atlas representative has clearly established in his depositions that Atlas has never sold orchids, has no relationship with suppliers of orchids, and has no plans to sell orchids in the future. (Bayona Disc. Tr.:16:7-20 and 61:12-25-62:1-2). Those facts also negate a likelihood of confusion. See, *S Industries, Inc. v. Stone Age Equipment, Inc.*, 49 USPQ 2d 1071 (N.D. Ill. 1998) (holding defendant's mark, STEALTH, for rubber used on climbing shoe soles not confusingly similar to plaintiff's STEALTH mark for athletic shoes and stating that the test for similarity of products is whether the products are the kind the public attributes to a single source). Courts have noted that product appearance, for example, plays a lesser role in a buyer's selection process when the product at issue is marketed to a particular industry for an industrial use, compared to when it is marketed to the public at large for general consumption. *Benjamin Moore & Co. v. Talon Paints Products, Inc.*, 917 F. Supp. 331 (D. N.J. 1996), aff'd 111 F.3d 125 (3rd Cir. 1997) (citing *Versa Products Company, Inc. v. Bifold Co. (Mfg.) Ltd.*, 50 F.3d 189 (3d Cir. 1995)). Similarly, the goods at issue in the instant case are marketed to the wholesale flower industry and not to the public at large for general consumption. Confusion is far from likely.

Another factor in Golden Vision's favor is the conditions under which, and buyers to whom, sales are made, such as "impulse" versus "sophisticated" purchasing. *duPont*, 177

USPQ at 567. Golden Vision's



products are marketed specifically to

wholesalers who are sophisticated, discerning professionals seeking a specific type of flower for later sale to the public. The goods sold under the Atlas Mark are likewise

marketed and sold to discerning professional wholesalers and distributors, and never directly to end consumers. (Bayona Disc. Tr. 24:5-15 and 25:22-24). Such buyers are not likely to confuse the two even if they encountered both sellers. The parties' customers are shopping for specialized horticulture products for resale. They are not likely to succumb to

impulse buying and not likely to confuse orchids under the



mark with

the flowers offered and sold by Atlas under their very different factor also weighs in favor of Golden Vision.



mark. This

In the likelihood of confusion analysis, one must also take into consideration the nature and extent of any actual confusion and the length of time and conditions under which there has been concurrent use without evidence of actual confusion. *duPont*, 177 USPQ at 567. The pertinent facts relevant to this inquiry are not in dispute. Golden Vision



has been using its

mark continuously and exclusively since June 2004.

Atlas has been using the latest version of its mark since February 2003. (see trademark application Serial No. 77/571417). Thus, the parties' marks have coexisted in the marketplace without confusion for nearly eight (8) years. (Bayona Trial Tr. 119 and 120). It is not likely confusion will develop in the future because the parties do not have customers in common (Bayona Trial Tr. 125:16-19) and Atlas has no intention of entering the orchid market. (Bayona Disc. Tr.: 61,62). Because there has been no actual confusion

for almost eight (8) years, this factor also weighs in favor of Golden Vision.

Atlas argues that little weight should be given to the lack of actual confusion over nearly eight years because no meaningful opportunity for confusion has occurred. It acknowledges that the parties have no customers in common and then states that there is no evidence that anyone other than the direct wholesale customers sees the Golden Vision Mark. However, both parties market to wholesalers and that is their target customer. While Atlas might additionally market to supermarkets and e-commerce merchants neither party is marketing to retail consumers.

Atlas has also alleged that the parties' markets almost completely overlap. It furthers this argument by claiming that the parties' marks are likely to be confused in the future. Atlas cannot support these inconsistent arguments. There is no evidence that either party intends to change its products or channels of trade. In fact, Atlas has repeatedly testified that it has no plans to enter the orchid market and might never be in the orchid market. (Bayona Disc. Tr.:16:7-20, 61:12-25-62:1-2 and Bayona Trial Tr. 101-102). The markets and channels of trade have been just as they are today and the evidence shows that they will remain the same. Consequently, there must have been meaningful opportunity for confusion in the past if Atlas is to prove that there is a likelihood of confusion in the future. If there was no meaningful opportunity for confusion in the past then there can be no likelihood of confusion in the future.

Other considerations regarding the issue of likelihood of confusion are the number and nature of similar marks in use on similar goods and the extent to which Atlas has the right to exclude others. *Id.* at 567. Golden Vision submits the Atlas Mark cannot preclude

others from registering different marks for different products, namely orchids using



, when there are several other GOLDEN or GOLD marks registered, or previously registered, with the U.S. Patent and Trademark Office for flowers or related goods. A review of the USPTO's TESS on-line database reveals several such marks. GOLDEN EAGLE (recently published for opposition for natural plants and flowers), GOLDEN VALLEY SEED (registered in 2003 for flower seeds), GOLD SHOULDER (registered in 2011 for flower bulbs and live flowering plants), BE GOLD. SEND FTD. (registered in 2008 for retail store services featuring flowers), GOLD COLLECTION (registered in 2011 for flowers), GOLD SPARK (registered in 2005 for live plants and flowers), GOLD FARMS ORGANIC LIVING and design (registered in 2005 for fresh flowers), and GOLD LEAF COLLECTION and design (registered in 1989 for artificial flowers and foliage). In addition, there are dead marks due to lack of renewal, which were active, registered marks during the use and registration periods of the parties herein. GOLDENPETALS for live plants and flowers (registered in 2000 and cancelled in 2007) and GOLDEN CIRCLE FARMS for fresh herbs and edible flowers (registered in 1999 and cancelled in 2005). The fact that these marks all coexisted in the marketplace and were all the subjects of federal trademark registrations is further evidence that Atlas does not have the right to exclude other uses of marks which contain GOLDEN for flowers, especially since the mark they are attempting to cancel is not the same or similar in appearance to the Atlas Mark.

Finally, one must take into consideration the extent of potential confusion, i.e.,

whether de minimis or substantial. *Id.* Given the fact that the goods of Atlas and Golden Vision are different, are used in different settings, and are sold to different sophisticated business purchasers using different channels of trade, it is not likely that these commercial consumers would begin confusing these two marks. Golden Vision has been using the



mark for orchids since June 2004, and has not encountered any confusion between the Golden Vision Mark and the Atlas Mark. In fact, Golden Vision has never encountered the use of the Atlas Mark in any setting. (S.W. Huang Tr. 44:18-19). Likewise, Atlas has not experienced any confusion with Golden Vision's mark and has never encountered the Golden Vision Mark in any setting. (Bayona Disc. Tr. 39:14-20 , 42:21-23, and 43:3-18). Further, it has been established through the deposition of Atlas's own representative that Atlas would never have been aware of the Golden Vision mark without the USPTO citing it against Atlas's trademark application. (Bayona Disc. Tr. 43:19-23). Atlas's representative is also not aware of any customers that Atlas has in common with Golden Vision. (Bayona Trial Tr. 125:16-19). Golden Vision has demonstrated that

there is no likelihood of confusion between its mark,



, and the Atlas



mark,

Due to the fact that a trademark is a source identifier and not a property right, the use of a competitor's mark that does not cause confusion as to source is permissible. *Knaack Mfg. Co. v. Rally Accessories, Inc.*, 955 F. Supp. 991, 999 [42 USPQ 2d 1649]

(N.D. Ill. 1997) (citing *Libman Co. v. Vining Indus., Inc.*, 69 F.3d 1360, 1362 [36 USPQ 2d 1751] (7th Cir. 1995)). As put succinctly in *Knaack*:

The likelihood of confusion must be determined with reference to the realities of consumer behavior in the relevant market. [citation omitted] *Knaack* must prove that such likelihood of confusion would occur to a significant number of consumers and not merely in an isolated situation. *Door Systems, Inc. v. Pro-Line Door Systems, Inc.*, 83 F.3d 169, 173 (7th Cir. 1996) (affirming summary judgment for defendant finding ‘we think it is wholly unlikely that any significant number of consumers would be misled. And that is the test.’) *Id.*

Not only is Golden Vision not using its competitor’s mark, but the mark it is using is simply not being confused with the Atlas mark and never will be. Thus, a likelihood of confusion does not exist under the law and the pertinent facts of this case.

II. The ‘073 Registration Should Not Be Partially Cancelled

As noted by Atlas in its Trial Brief, the record is clear that Golden Vision is currently using, and has always used, the mark depicted in the ‘073 Registration on live orchids. Contrary to Atlas’s assertion that the evidence is clear that the mark has not been used on the other goods specified in the ‘073 Registration, the evidence presented by Atlas fails to support its assertion and it has simply relied on speculation without evidentiary support. Atlas states that it is “doubtful” that Golden Vision has used its mark on goods other than live orchids. However, it only cites to the deposition of Shih Wen Huang for that assertion and ignores the evidence of use. Notably, later in its Trial Brief Atlas argues that only five items listed on the Statement of Use were never offered for sale under the Golden Vision mark.

Atlas relies heavily on the deposition of Shih Wen Huang that was taken on December 9, 2009. Ms. Huang began working with Golden Vision in 2007. (S.W. Huang

Tr. 1112-15). Her tenure began four years after Golden Vision began its business in the United States and two years after the Statement of Use was signed and filed. Her discovery deposition reveals that she was merely speculating regarding use prior to her arrival. Ms. Huang testified that her involvement was limited to sporadic assistance with trade shows, translation with customers for her father, and some financial matters. (S.W. Huang Tr. 11:13 – 12:5). Atlas places emphasis on the opinion of Ms. Huang that Golden Vision had only grown and sold orchids and that she was not aware of the company selling all of the items listed on its specimen tag. In response to Atlas's question about how the tag was used Ms. Huang stated that it was a picture of the tag taken in 2005 and "she wasn't even here yet." (S.W. Huang Tr. 77: 16-17). The testimony cited by Atlas regarding Ms. Huang's lack of familiarity with Golden Vision offering or selling all of the items listed on the tag and on its Statement of Use is equally infirm. Ms. Huang's testimony shows that she was merely guessing as to Golden Vision's intention at a time when she was not with the company. She stated that, "this is probably the product line that we liked to carry" and "I think in the beginning we was planning to have more products than orchids." (S.W. Huang Tr. 77: 13-21). Consequently, her testimony is the least reliable as to use of the mark at the time material to Atlas's argument.

Atlas has noted that the testimony of Golden Vision officers and agents is somewhat contradictory so the testimony of the person with the most knowledge regarding the issues in the case is necessarily the most reliable and non-speculative. Such testimony was given by Shun Chi Huang, the company's President. The following testimony given by him clearly demonstrates use of the mark on the goods listed in the '073 Registration that Atlas claims were never offered:

- Golden Vision used its mark beginning in 2004. (S.C. Huang Tr. 29:2-17).
- Golden Vision used its mark on commercial pamphlets, ads in magazines, care tags on its plants, and on its shipping cartons. (S.C. Huang Tr. 32:1 – 35:24, 40:22 -25, 58:19-22, and 61:4 – 62:5).
- Golden Vision used its mark in connection with dried flowers and live flowers, but doesn't produce dried flowers anymore. (S.C. Huang Tr. 43:18 – 24). It is important to note that the follow up question from Petitioner's counsel asks whether Golden Vision has "produced" dried flowers in connection with the mark. It does not ask whether Golden Vision has sold or offered dried flowers for sale in the United States. Consequently, Mr. Huang's answer is that Golden Vision did not "produce" them in the United States.
- Golden Vision used its mark in connection with orchids which are live flowers. (S.C. Huang Tr. 44:3-13)
- Golden Vision used its mark in connection with flower bulbs. It sold orchids in various states from bulbs to mature orchids. (S.C. Huang Tr. 44:14 – 45:16). This is further explained in the deposition of Shih-Wen Huang wherein she stated that Golden Vision has various pricing for orchids because some customers want spikes, some want bulbs, and some want fully mature orchids. (S.W. Huang Tr. 30:4-11).
- Golden Vision has used the mark in connection with flower seeds and Mr. Huang explained that the mark had to be on the carton because it is impossible to put it on the seeds themselves. (S.C. Huang Tr. 45:17-22).
- Golden Vision has used the mark in connection with live

flowering plants which are mature orchids. (S.C. Huang Tr. 46:2-10).

- Golden Vision has used the mark in connection with grass and grass seeds. This began around 2005. (S.C. Huang Tr. 46:21 – 47:6).

- Golden Vision used the mark in connection with fresh herbs and raw herbs. However, there was no market for them so Registrant did not produce much and, in fact, did not make any sales of those items. (S.C. Huang Tr. 47:20 – 48:11).

Even the following testimony of Li Ying Chuang demonstrates that Golden Vision had marketed and attempted to sell the five items identified by Atlas:

- Cut flowers was one of Golden Vision's lines of business at the beginning and then they did an evaluation to see if it was good or not and the market was different. (Chuang Tr. 40: 7-16).

- Golden Vision sold cut flowers with its mark on its shipping boxes and on its tags. (Chuang Tr. 41: 7-14).

- Golden Vision received dried flowers for sale under its mark, albeit once. Mrs. Chuang was not sure of the date, but believed it to be 2004. (Chuang Tr. 42:15-23).

- Golden Vision sold live flowers in 2004 and continues to do so. (Chuang Tr. 42:24 – 43: 13).

- Golden Vision was selling flower bulbs at the very beginning in either 2004 or 2005. (Chuang Tr. 43:18 – 44:1).

- Golden Vision tried selling everything at the very beginning. (Chuang Tr. 43:20-21).

- Golden Vision sold flower seeds starting in 2004. (Chuang Tr. 45:18-20).

The deposition testimony clearly indicates that Golden Vision made sales, even if some were minimal, or at least offered for sale the items listed in the '073 Registration and on its care tag specimen. Atlas has merely speculated that the Golden Vision mark was not used on as many as twelve of the thirteen listed items, but has only focused its argument on five. The above-cited testimony demonstrates that there was use as to those five items.

Mrs. Chuang testified that Golden Vision used the mark at the beginning on cut flowers and dried flowers, but the market was not good for them. Mr. Huang testified that there were not many customers for fresh herbs and raw herbs so not many were produced and they made no sales. Notably, Atlas's question to Mr. Huang in his deposition only asked if Golden Vision had ever sold any fresh or raw herbs, not whether they offered them. More importantly, Mrs. Chuang testified that Golden Vision tried selling everything in the beginning. Consequently, Atlas has failed to meet its burden of proof to demonstrate a failure of use.

III. The '073 Registration Should Not Be Cancelled For Fraud

In re Bose Standard

In re Bose, 580 F. 3d 1240, 1245; 91 U.S.P.Q. 2d 1938 (Fed. Cir. 2009), requires that Atlas prove that Golden Vision knowingly made a false, material representation with the intent to deceive the USPTO. Atlas has failed to satisfy these requirements and, in fact, has failed to prove any subjective intent to deceive. At most, Petitioner has shown that certain statements may have been inaccurate. However, it is required to clearly and convincingly prove that the alleged false statements were made with subjective intent to

deceive the Trademark Office. *Id.* at 1245. Atlas failed to introduce competent evidence to satisfy this standard on its Motion for Summary Judgment and has produced no additional evidence at trial. Notably, Atlas doesn't even attempt to fit the facts of this case within the *Bose* standard for intent and relies solely on its request that this Board adopt a reckless disregard standard to prove intent. It has failed to meet its burden of proof.

While Golden Vision is aware that this Board is knowledgeable of the *Bose* decision and its standards, there are several salient pronouncements worth noting from that decision and others citing thereto. Atlas "bears a heavy burden of proof that requires it to prove fraud 'to the hilt' with clear and convincing evidence. There is no room for speculation, inference or surmise and any doubt must be resolved against it." *In re Bose*, 580 F. 3d at 1243.

In rejecting the standards of negligence and gross negligence, the *Bose* court held a "trademark is obtained fraudulently only if the applicant or registrant knowingly makes a false, material representation with the intent to deceive the PTO." *Id.* at 1245. "Subjective intent to deceive, however difficult it may be to prove, is an indispensable element in the analysis...and all evidence must still be clear and convincing. Inferences drawn from lesser evidence cannot satisfy the deceptive intent requirement." *Id.* Absent clear and convincing proof of a subjective intent to deceive, Petitioner's claim of fraud must fail even if it proves a material misrepresentation. *Pandora Jewelers 1995, Inc. v. Pandora Jewelry, LLC*, 2011 WL 2174012, 14 (S.D. Fla. 2011).

The *Bose* court also reasoned that, "when drawing an inference of intent the involved conduct must indicate sufficient culpability to require a finding of intent to deceive." *In re Bose*, 580 F. 3d at 1245. This language is quite compelling. The court was not

simply stating that any inference drawn should reasonably support a finding of intent to deceive. Rather, the court stated that the conduct at issue “must” show sufficient culpability to “require” a finding of intent to deceive. If reasonable minds could differ on whether a finding of intent to deceive was required then there should be no such finding. Nothing that Atlas has cited as support for its fraud arguments shows sufficient culpability to require the Board to find an intention to deceive.

As noted by the *Bose* court, the inquiry must focus on the registrant’s subjective, honestly held, good faith belief when making its statement. *Id.* at 1244. “Merely making a false statement is not sufficient to cancel a mark. There is a material legal distinction between a false representation and a fraudulent one, the latter involving an intent to deceive, whereas the former may be occasioned by a misunderstanding, inadvertence, a mere negligent omission, or the like.” *Salu, Inc. v. The Original Skin Store*, 2010 WL 1444617, 3 (E.D. Cal. 2010). Consequently, “considerable room for honest mistake, inadvertence, erroneous conception of rights, and negligent omission must be given and any doubts must be resolved against the charging party.” *Pilates, Inc. v. Current Concepts, Inc.*, 120 F. Supp. 2d 286, 313, 57 U.S.P.Q. 2d 1174, 1196 (S.D.N.Y. 2000).

RECKLESS DISREGARD IS NOT AN APPROPRIATE STANDARD

Atlas’s request that a reckless disregard for the truth be held to satisfy the intent to deceive requirement would reintroduce a gross negligence standard. Golden Vision acknowledges that the *Bose* court did not resolve the question of whether a reckless disregard standard was sufficient. Golden Vision further agrees that the Trademark Trial and Appeal Board stated that this was still an open question in *DaimlerChrysler Corporation v. American Motors Corporation*, 94 U.S.P.Q. 2d 1086, 2010 WL 1146943

(TTAB 2010). Golden Vision submits that such a standard would not be appropriate and is contrary to the *Bose* decision that rejected a gross negligence standard.

In its attempt to have this Board adopt a reckless disregard standard Atlas has cited to cases of mail fraud, securities fraud, and RICO violations. Notably, Atlas has not cited a single trademark case subsequent to the *Bose* decision that would support its theory. Its reliance on *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308 (2007), is misplaced at best. Petitioner cites to only part of a footnote for the statement that “every Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly.” In fact, the Supreme Court stated in its footnote that the “question of whether and when recklessness satisfies the scienter requirement is not presented in this case.” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3 (2007). The Court further commented that it had previously reserved on whether reckless behavior was sufficient for civil liability under Section 10(b) and Rule 10b-5, and that the circuits themselves differed on the degree of recklessness required. *Id.* Also notable is the fact that this case was a civil case for securities fraud that has a specific statute setting forth the elements of a fraud claim so it is inapplicable to the instant case. Similarly, Atlas’s reliance on its mail fraud cases is not appropriate. Those cases also interpret the specific language of statutes that are not at issue here and are based on precedential interpretations of those statutes as they related to the specific crimes charged. Atlas’s reliance on *Walker-Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172 (1965), is also misplaced because it relates to fraud in the patent context. The *Pandora* court noted that “fraud in the trademark registration context has taken a very different distinction than the law of fraud in the patent

procurement process.” *Pandora Jewelers 1995, Inc.*, 2011 WL 2174012 at 14.

Adopting the reckless disregard standard to satisfy the intent to deceive requirement would only serve to bring the “should have known” standard back to some degree. The *Bose* court specifically rejected both negligence and gross negligence standards for finding intent to deceive. The definition of gross negligence necessarily includes reckless disregard for the truth. Black’s Law Dictionary defines gross negligence as an intentional failure to perform a duty in reckless disregard of the consequences, and further states that recklessness and gross negligence have no clear distinction and have tended to take on the same meaning. While decided in a patent inequitable conduct case, the court in *CMI, Inc. v. Intoximeters, Inc.*, 866 F. Supp. 342, 346 (W.D. Ky 1994), 33 U.S.P.Q. 2d 1117, 1121, held that “intent to deceive may be established by a showing of gross negligence, namely reckless disregard of the duty of candor.” Consequently, there is an implied element of the “should have known” standard based on the accused party’s disregard for discharging a duty that would have led to it knowing certain information was false. Even if such a standard were appropriate, Atlas has failed to demonstrate clearly and convincingly that any alleged false statements were made with the requisite recklessness to constitute intent to defraud the USPTO.

STATEMENT OF USE SIGNATURE NOT FRAUDULENT

Atlas has failed to demonstrate by clear and convincing evidence that Golden Vision had a subjective intent to deceive the USPTO by designating Li Ying Chuang as President on the Statement of Use. It has made the quantum leap from Mrs. Chuang not being the President to a conclusion that she had the requisite intent to defraud the Trademark Office. However, it has offered no evidence of intent whatsoever. Golden Vision acknowledges

that Mrs. Chuang was not its President. However, the designation was merely an honest mistake compounded by a language barrier with no fraudulent intent. Furthermore, Mrs. Chuang's testimony reveals that she had firsthand knowledge of the goods offered by Golden Vision. Atlas has failed to produce any evidence that she did not have the actual or implied authority to sign on behalf of the corporation.

Mrs. Chuang is an owner of shares in Golden Vision and is the wife of the company's President. (Chuang Tr. 14:25-15:1). She does not speak or read English. As noted by Atlas in its Trial Brief, the testimony of Mrs. Chuang and the other two representatives of Golden Vision is in part contradictory. A review of the depositions reveals that they are quite unclear and confusing within themselves. Mr. Huang even states in his deposition that Mrs. Chuang was the President of Export for Golden Vision. (S.C. Huang Tr. 58:9-10). Such confusion is consistent with the most reasonable interpretation of what occurred with the Statement of Use. That is, the Statement of Use was prepared by Golden Vision's counsel in the United States who mistakenly listed Mrs. Chuang as President, transmitted it to the company's lawyer in Taiwan who only explained the body of the document, and then it was returned to the lawyers in the U.S. for filing. There is no reasonable interpretation of the facts other than that because there would be no motive for Golden Vision to incorrectly designate its President. As noted by the *Bose* court, all doubts must be resolved against Atlas and in favor of Golden Vision. *In re Bose*, 580 F. 3d at 1243. Considerable room for honest mistake, inadvertence, erroneous conception of rights, and negligent omission must be given to Golden Vision. *Pilates, Inc.*, 120 F. Supp. 2d at 313, 57 U.S.P.Q. 2d at 1196.

During Mrs. Chuang's deposition Atlas asked her if her Taiwanese lawyer translated

and explained various portions of the Statement of Use to her. (Chuang Tr. 27:8-29:22). However, Atlas did not ask if her Taiwanese lawyer translated and explained to her that she had been designated as the President of Golden Vision on her signature block. Atlas did not ask her if she signed her name with the incorrect designation with an intention to defraud the Trademark Office. Atlas even failed to ask her if she was aware that she had been listed as the President and, if she was so aware, why she signed with an incorrect title. Atlas has produced no clear and convincing evidence regarding Mrs. Chuang's subjective intent when signing the Statement of Use. At most, it has merely shown that she was incorrectly listed as President of Golden Vision. However, *Bose* requires that Atlas introduce evidence of Mrs. Chuang's subjective, honestly held, good faith belief in executing the Statement of Use as President. *In re Bose*, 580 F. 3d at 1244. It has failed to do so.

The arguments made by Atlas refute its allegations that Li Ying Chuang was not qualified to sign the Statement of Use. It admits that Mrs. Chuang could possibly qualify under TMEP § 611.03(a)(ii) as having actual or implied authority to bind the corporation. Atlas then states that Mrs. Chuang does not qualify under that section because she did not have firsthand knowledge of the goods being sold or offered for sale by Golden Vision. Despite that allegation, Atlas later cites to Mrs. Chuang's testimony to support its argument that Golden Vision was not using its mark as to certain goods listed on the '073 Registration. If Mrs. Chuang had knowledge to testify about the goods that Golden Vision was allegedly not selling then she had knowledge sufficient to sign the Statement of Use. Atlas cannot claim she did not have sufficient knowledge to sign the Statement of Use, but also claim that she had sufficient knowledge to testify about what goods Golden Vision was

not selling. The deposition testimony of Li Ying Chuang cited above clearly shows that she had firsthand knowledge about the goods being offered by Golden Vision. Atlas has failed to offer any evidence that Mrs. Chuang lacked the actual or implied authority to bind Golden Vision with her signature. Consequently, Atlas's contention that the Statement of Use is fraudulent fails.

STATEMENT OF USE NOT FRAUDULENT AS TO GOODS

As with Petitioner's other arguments, it has failed to demonstrate with clear and convincing proof that Golden Vision intended to defraud the USPTO in its identification of goods on its Statement of Use. The deposition testimony relied on by Atlas shows no direct evidence of any intent to defraud. Furthermore, the evidence is not clear and convincing evidence from which inferences can be drawn in favor of Atlas. *Bose* requires that Atlas prove the indispensable element of subjective intent to deceive by clear and convincing evidence.

Atlas has admitted that the testimony procured by it during the depositions of Golden Vision's representatives is contradictory. A review of the testimony demonstrates that it is quite unclear, at best. Thus, it is not the type of evidence from which any inferences are permitted according to *Bose*. Even if inferences were permitted to be drawn from that testimony they are far from strong enough to show sufficient culpability that would require this Board to find intent or even reckless disregard. Consequently, Atlas has failed to make a prima facie showing that would shift the burden of proof to Golden Vision.

The Statement of Use Is Not Factually False

Atlas claims that the Statement of Use is fraudulent because it verifies use of the

Golden Vision mark on goods that were not offered under the Golden Vision Mark. Its argument cites only the testimony of Shih Wen Huang for the allegation that the mark was used only on live orchids and was; therefore, fraudulent as to the remaining twelve items. It focuses its argument that the mark was not used as to five items based on the testimony of Shun Chi Huang and Li Ying Chuang. While Atlas argues that the deposition testimony is contradictory it can, in fact, be reconciled. As noted above, Shih Wen Huang did not begin working with Golden Vision on a day-to-day basis until 2007. (S.W. Huang Tr. 11:12-15). Prior to that time all operations of Golden Vision were handled by Shun Chi Huang. (S.C. Huang Tr. 25:8-10). The Statement of Use at issue was executed on August 8, 2005 and filed on January 6, 2006, approximately two years before Ms. Huang arrived. Consequently, it is not surprising that Ms. Huang was not completely knowledgeable of the products offered by Golden Vision under its mark prior to her arrival in 2007.

The deposition testimony cited above clearly indicates that Golden Vision made sales, even if some were minimal, or at least offered for sale all of the items listed in the Statement of Use and on its care tag specimen. Even though it claims that “more than likely as many as twelve” items were not offered under Golden Vision’s mark, Atlas focuses its argument on an alleged lack of use of the mark on cut flowers, dried flowers, dried plants, and fresh and raw herbs. Mrs. Chuang testified that Golden Vision used the mark at the beginning on cut flowers and dried flowers, but the market was not good for them. (Chuang Tr. 41:7-14, 42:15-23, and 43:20-21). Mr. Huang testified that there were not many customers for fresh herbs and raw herbs so not many were produced and they made no sales. (S.C. Huang Tr. 47:20 – 48:11). Most importantly, Mrs. Chuang testified that Golden Vision tried selling everything in the beginning (Chuang Tr. 43:20-21). In response

to a question from counsel for Atlas as to whether Mrs. Chuang knew whether Golden Vision was selling the items listed on the Statement of Use she stated, “they selling but I don’t know if that’s everything.” (Chuang Tr. 47:3-8).

No Direct Evidence of Intent to Deceive

Atlas has failed to produce any direct evidence showing that Golden Vision had a subjective intent to deceive the Trademark Office when executing and filing its Statement of Use. Atlas never asked any of Golden Vision’s representatives during their depositions whether they intended to get a registration for products that they had not and were not offering for sale. In fact, Atlas never asked anything about Golden Vision’s interaction with the Trademark Office. The only testimony remotely related to intent was Mrs. Chuang’s statement that she believed everything in the Statement of Use to be correct. (Chuang Tr. 39:8-8-14). Counsel for Atlas specifically asked whether Mrs. Chuang believed everything in the Statement of Use to be correct when she signed it and her answer was “yes”. (Chuang Tr. 39:8-14).

Bose requires that Atlas introduce evidence of Golden Vision’s subjective, honestly held, good faith belief in executing and submitting the Statement of Use. *In re Bose*, 580 F. 3d at 1244. As footnoted by the TTAB in *DaimlerChrysler Corporation v. American Motors Corporation*, 94 U.S.P.Q. 2d 1086, 2010 WL 1146943 (TTAB 2010), the petitioner in that case failed to introduce direct evidence of intent because it focused solely on respondent’s use of its mark rather than its interaction with the Trademark Office. The same is true in the instant case. Atlas relies solely on Golden Vision’s use of its mark on the goods listed and didn’t even seek evidence related to its intent. Atlas alleges that Mrs. Chuang testified that she was not aware of the goods being offered by Golden Vision at the

time she executed the Statement of Use. Notably absent from Atlas's questioning was the most important question regarding her intent: "Why did you sign the Statement of Use if you were not aware of what Golden Vision was offering for sale?" Even if the Statement of Use were incorrect as alleged, Petitioner's claim must fail because no subjective intent to deceive has been established.

Reckless Disregard Is Not An Appropriate Standard and None Has Been Proven

As set forth above, a reckless disregard standard should not be adopted as requested by Atlas. Even if the Board adopts such a standard Atlas has failed to introduce clear and convincing evidence showing a reckless disregard sufficient to require a finding of subjective intent to deceive. Without competent proof of deceptive intent Atlas's claims must fail even if they have shown material false statements.

Atlas acknowledges that it has the burden of proving deceptive intent by clear and convincing evidence. This is a heavy burden that Atlas has failed to satisfy. While deceptive intent can be proven by indirect and circumstantial evidence it must still be clear and convincing evidence. Atlas relies solely on inferences drawn from very unclear evidence to attempt to prove intent. As noted by the court in *Bose*, inferences drawn from anything other than clear and convincing evidence are not appropriate. *In re Bose*, 580 F. 3d at 1243. Atlas has completely ignored the considerable room for honest mistake, inadvertence, and negligent omission that must be given to Golden Vision. It has also omitted that any doubts must be resolved against it. See, *Pilates, Inc. v. Current Concepts, Inc.*, 120 F. Supp. 2d at 313, 57 U.S.P.Q. 2d at 1196.

Atlas has failed to introduce the required clear and convincing evidence showing that Golden Vision's conduct in executing the Statement of Use had such a disregard for

the truth that it nearly amounts to actual intent to deceive. While it may have demonstrated that some statements were incorrect, it has not introduced any evidence that could show Golden Vision's intent. Atlas has failed to show that Golden Vision took any steps such as instructing its lawyers to designate Mrs. Chuang as the President instead of Mr. Huang that could show intent or reckless disregard. It also failed to ask the most pertinent question regarding intent: "Why." If Mrs. Chuang did not have sufficient knowledge regarding the goods being offered then why did she verify that she did. If she knew that Golden Vision was not offering the goods listed then why did she verify that they were. Atlas also fails to prove Golden Vision's subjective, honestly held, good faith belief when it made its statement as required by *Bose*. *In re Bose*, 580 F. 3d at 1244. The testimony cited herein shows that Mrs. Chuang was a properly authorized signatory and that Golden Vision believed the Statement of Use to be accurate. Consequently, a reckless disregard for the truth cannot exist.

Atlas also ignores reasonableness and common sense in its interpretation of the record. The transcripts of the depositions of Shun Chi Huang and Li Ying Chuang demonstrate anything but clear and convincing evidence from which Atlas can draw inferences in its favor. The testimony is unclear and confusing and responses to questions show that translations during the depositions were equally confusing. While Mrs. Chuang stated that her Taiwanese lawyer translated the content of the Statement of Use to her, Atlas did not even ask if the lawyer informed her that she was signing it as President of Golden Vision. Therefore, there is no evidence whatsoever that she was even aware that she was signing with an incorrect designation. Atlas has offered no motive for Golden Vision to incorrectly identify its President. The likely scenario is that the Taiwanese lawyer

did not translate that designation and simply confirmed the facts contained in the Statement of Use and had Mrs. Chuang sign it. While that designation is incorrect, and possibly the result of negligence, Atlas has offered no evidence that would require the Board to find that it was made with intent to defraud the Trademark Office.

As set forth above, the deposition testimony clearly indicates that Golden Vision made sales, even if some were minimal, or at least offered for sale all of the items listed in the Statement of Use and on its care tag specimen. Petitioner seeks cancellation based on an alleged lack of use of the mark on cut flowers, dried flowers, dried plants, and fresh and raw herbs. Mrs. Chuang testified that Registrant used the mark at the beginning on cut flowers and dried flowers, but the market was not good for them. Mr. Huang testified that there were not many customers for fresh herbs and raw herbs so not many were produced and they made no sales. Atlas's question to Mr. Huang in his deposition only asked if Golden Vision had ever sold any fresh or raw herbs, not whether they offered them. Most importantly, Mrs. Chuang testified that Registrant tried selling everything in the beginning. The commercial reality that there was no market for certain products does not require a finding that the Statement of Use was fraudulent.

Its own arguments defeat Atlas's claim of fraud. Atlas cites portions of the depositions of Golden Vision's representatives because it claims their testimony is contradictory. Based on that allegation alone there can be no clear and convincing evidence from which Atlas can draw inferences in its favor to prove reckless disregard equivalent to fraud. In accordance with *Bose*, it is not entitled to draw any inferences in its favor at all.

In its ruling on Atlas's Motion for Summary Judgment this Board noted that Atlas had

failed to present evidence that would satisfy the *Bose* standard or a reckless disregard standard. While the Board could not resolve genuine issues of material fact on summary judgment, Atlas has failed to introduce any additional evidence demonstrating subjective intent. That evidence necessarily has to come from Golden Vision and its honestly held belief at the time the Statement of Use was executed. No additional evidence has been obtained or presented by Atlas since summary judgment. Accordingly, it has again failed to introduce clear and convincing evidence sufficient to carry its burden and require a finding of subjective intent to deceive by Golden Vision.

Conclusion

For the reasons set forth above Atlas's request for cancellation should be denied in its entirety.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished via U.S. Mail and electronic mail on March 2, 2012 to Tal Benschar, 488 Madison Avenue, New York, NY 10022.

CERTIFICATE OF FILING

I HEREBY CERTIFY that the foregoing is being filed with the Trademark Trial and Appeal Board through the ESTTA system on March 2, 2012.


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